Nos. 89-628, 89-640

Supreme Court, U.S.
FILED
DEC 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL WILDLIFE FEDERATION

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QUESTION PRESENTED

1. Whether individuals who use federal lands for recreational purposes, and whose use and enjoyment of those lands will be adversely affected as a direct result of a government program or policy, have standing to challenge that program or policy?

PARTIES

Respondent National Wildlife Federation* accepts the Secretary of the Interior's list of all parties to the proceeding below.

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* The National Wildlife Federation (NWF) is a non-profit corporation incorporated in the District of Columbia. It has no parent companies, subsidiaries, or affiliates in which any outside persons or investors might have an interest. NWF has two "subsidiaries:" National Wildlife Federation Endowment, Inc. and Wildlife Publications, Inc., both based in Washington, D.C. NWF also holds a majority interest in DeSoto Greetings, Inc., a Maryland corporation. NWF has fifty-two "affiliates," one in each state, as well as the Virgin Islands and Puerto Rico. Each affiliate is a non-profit environmental/conservation organization.

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STATEMENT OF THE CASE

This action challenges specific violations of applicable federal statutes in the formulation and implementation of the Department of the Interior's (Department's) ongoing "Land Withdrawal Review Program" (Program) under which land withdrawals and classifications have been terminated. Withdrawals and classifications are two mechanisms used by the Department to protect federal lands against unwise or premature disposition and development. Classifications and withdrawals act to protect federal lands from disposal under the agricultural laws (*i.e.*, homestead, desert land entry, and Indian allotment), from sale, from exchange, from mineral leasing, and from location under federal mining laws. The underlying purpose of classifications and withdrawals is to limit private activities on federal lands in order to maintain the public values of these lands, including recreation and fish and wildlife.[1]

The Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 *et seq.* (1982), enacted in 1976,

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[1] Contrary to the assertions of petitioners, withdrawals and classifications do not mandate any affirmative duty on the part of the Department. Petitioners, therefore, mislead the Court when they suggest that the mere existence of a power site withdrawal in the Grand Canyon requires the construction of a dam. Secretary of the Interior's Petition for a Writ of Certiorari [hereinafter Gov. Br.] at 7. The withdrawals at issue in Arizona were executed in the early 1900's yet the Colorado River still flows freely through the Grand Canyon. What petitioners fail to mention is that the revocation of these withdrawals opened lands immediately adjacent to Grand Canyon National Park to private mineral development.

contains specific provisions governing the disposition of classifications and withdrawals. *See, e.g.*, 43 U.S.C. §§ 1712(d), 1714(l). In addition, the savings provision of FLPMA, Pub. L. No. 94-579, 90 Stat. 2743, provides in Section 701(c) that "[a]ll withdrawals, reservations, classifications, and designations in effect as of the date of the approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law."

Between FLPMA's enactment in 1976 and 1980, the Department engaged primarily in completing an inventory of withdrawn or classified lands. Affidavit 1B of Frank Edwards ¶ 24. In 1981, however, under the direction of the new Secretary of the Interior, James G. Watt, the Department put in motion a comprehensive program to terminate withdrawals and classifications and to open as much land as possible to commercial uses:

> One of the Administration's goals is to build the United States strategic minerals stockpile. An important means to attaining this goal is to open "locked-up" Federal land to mineral exploration and development through aggressive pursuit of the withdrawal review program . . . .

Letter to Secretary of Energy James B. Edwards from Secretary of the Interior James G. Watt (July 13, 1982) (Plaintiff's Exhibit No. 70). New instructions were issued to the field offices that withdrawals were to be eliminated as quickly as possible:

> Since the first of the year, substantial shifts in program emphasis and direction have occurred. More precise priorities have been established; specific production commitments required of the State Offices.

. . . .

> The new administration has stated clearly its objective to eliminate all unnecessary withdrawals of federal lands, opening as many acres as possible to the operation of the mining and mineral leasing laws.

Memorandum to the Acting Director of the Bureau of Land Management from the Assistant Director for Lands and Rights-of-Way (February 20, 1981) (Plaintiff's Exhibit No. 73). Terminations of classifications and withdrawals subsequently proceeded rapidly under the Program. By mid-1985, the Department had terminated protective classifications and withdrawals for approximately 180 million acres of public land. Affidavit of James Parker ¶ 35; Affidavit 1A of Frank Edwards ¶ 25 (Joint Appendix filed in the court of appeals [hereinafter J.A.] 71).

The Program has opened many areas to commercial development, particularly mineral exploitation, that have important recreational, environmental, or other public values – public values that may well be sacrificed as a result of the Department's actions.[2] As the court of appeals noted, changed uses, particularly the opening of

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[2] For example, the Department terminated a reclamation withdrawal covering 34,285 acres in Utah, opening 8,360 acres to the operation of the mining laws, 46 Fed. Reg. 7348 (January 23, 1981), despite the prospect that placer mining in the area would have an adverse impact on two endangered species of fish, as well as potential impacts on endangered bald eagles and peregrine falcons. In addition, campgrounds and other recreational sites have been opened to mining and mineral leasing. *See, e.g.*, 47 Fed. Reg. 11671 (March 18, 1982); 49 Fed. Reg. 32808 (August 16, 1984).

lands to mineral exploitation, can destroy fragile natural resources, as well as the use of natural areas for aesthetic and recreational purposes. (Appendix to the Secretary's Petition for a Writ of Certiorari [hereinafter Gov. App.] 78a-79a).

In July 1985, respondent, the National Wildlife Federation (NWF), filed suit challenging the Program. In its complaint for declaratory and injunctive relief, NWF alleged that the Department's wholesale termination of these protective withdrawals and classifications violated a number of specific provisions of federal law, including FLPMA, the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1982), and the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* (1982). In its request for relief, NWF sought, among other things, the completion of a programmatic environmental impact statement (EIS), the promulgation of regulations governing the Program, adequate opportunities for public participation in the Program and its activities, and the submission of proposed actions to the Congress for review. Amended Complaint at 16 (J.A. 37). [1]

Simultaneously with the filing of its complaint, NWF moved for a preliminary injunction. Federal defendants responded by filing a motion to dismiss Count II of the complaint on the ground that NWF lacked standing to raise the Department's failure to submit its withdrawal recommendations to Congress.[3] United States Representative John F. Seiberling then moved to intervene on

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[3] NWF claimed in Count II that the Department was in violation of Section 204(1) of FLPMA, 43 U.S.C. § 1714(1), by terminating classifications and withdrawals in eleven western states without prior submission of a recommendation to the President or to Congress.

Count II. The district court granted the intervention of Congressman Seiberling, confirmed his standing as well as that of NWF,[4] and issued a preliminary injunction after finding that NWF was likely to succeed on the merits of at least two of its claims and would be irreparably harmed in the absence of interim relief. (Gov. App. 130a).

Defendant-intervenor Mountain States Legal Foundation (Mountain States) sought reconsideration of the district court's preliminary injunction order arguing that NWF could prove no injury to either itself or its members. The district court rejected Mountain States' claims noting that "[t]his question, while challenging our jurisdiction to grant equitable relief, raises the issue of plaintiff's standing to sue," (Gov. App. 139a), and went on to hold that "[w]e continue to find irreparable injury to plaintiff and reaffirm plaintiff's standing to bring this action," (*id.* at 139a-40a).

In anticipation of filing for summary judgment, NWF submitted affidavits in support of the standing allegations of its complaint. In both its original and its amended complaint, NWF stated that it has over 4.5 million members, many of whom "use and enjoy the environmental resources that will be adversely affected by the challenged actions." Amended Complaint ¶¶ 5, 6 (J.A. 24-25). As examples of the injuries actually suffered

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[4] Upon Mr. Seiberling's retirement from the Congress, the district court ordered the substitution of Congressman Bruce F. Vento, who succeeded Seiberling as Chairman of the Subcommittee on National Parks and Public Lands, and reaffirmed his standing. Order (June 2, 1987) (J.A. 251).

by its members, NWF submitted the affidavits of Peggy Kay Peterson and Richard Loren Erman.

Ms. Peterson lives in Casper, Wyoming and recreates on the federal lands in the South Pass/Green Mountain area of Wyoming. Affidavit of Peggy Kay Peterson (April 7, 1986) ¶¶ 2, 3 (Gov. App. 1901a). She states that her "recreational use and aesthetic enjoyment" of the lands she uses will be adversely affected by the decision to open them "to the staking of mining ~~claims~~ and oil and gas leasing" and that mining or oil and gas development "threatens the aesthetic beauty and wildlife habitat potential of these lands." *Id.* at ¶¶ 6, 7 (Gov. App. 191a). It is undisputed that on May 10, 1984, the Department terminated classification order no. W-6228 and opened 4,455.06 acres of land in the South Pass/Green Mountain area of Wyoming to the operation of the mining law. 49 Fed. Reg. 19904 (May 10, 1984).

The injury to Ms. Peterson's continued use and enjoyment of these lands as a direct result of terminating this classification is corroborated by the Department's own documents. The Department's records reveal that on the day the lands were opened, 199 mining claims were staked. Prior to the imposition of the district court's preliminary injunction, 406 mining claims had been staked on these lands and four mines began operations. Exhibit 9C to Edwards Affidavit 1C (J.A. 118). Government counsel concedes that additional mineral development on these South Pass/Green Mountain lands is imminent. Transcript of Hearing (July 22, 1988)

[hereinafter Transcript] at 58 (J.A. 310).[5] The draft resource management plan prepared for this area by the Department in 1986 acknowledges that:

> [i]n the Green Mountain Management Unit, uranium exploration and development might cause significant losses of crucial winter and winter/yearly elk and muledeer ranges and in trout habitat in the Willowcreek and Cottonwood Creek drainages over the longterm. Elk and trout populations may be lost entirely.

Department of the Interior, Draft Lander Resource Management Plan/EIS (1986) at 228 (Plaintiff's Exhibit No. 61).

Richard Loren Erman lives in Phoenix, Arizona and recreates on federal lands near the Grand Canyon National Park, the Arizona Strip, and the Kaibab National Forest. Affidavit of Richard Loren Erman (April 1986) ¶¶ 2, 3 (Gov. App. 187a). He specifically states that his recreational use and aesthetic enjoyment of lands in the Arizona Strip are adversely affected by the decision of the Department to open the lands to the staking of mining claims. *Id.* at ¶ 6 (Gov. App. 188a). Although the Department contends that the land is of little mineral value, 669 mining claims have been staked on these lands since they were opened and one notice of operations has been filed. Exhibit 11A to Edwards Affidavit 1A (J.A. 84). The patenting of these claims will result in the permanent

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[5] Ms. Peterson and NWF learned during the summer of 1988 that U.S. Energy Corporation plans to develop yet another uranium mine, in part on lands previously closed to mining by classification order no. W-6228. Declaration of Peggy Kay Peterson (August 28, 1988) ¶ 7.

loss of these lands to public recreational use, including that of Mr. Erman.

NWF's complaint also alleged that it is injured as an organization by its inability: 1) to obtain information on the Department's Program and the actions completed under its aegis; and 2) to participate in the Department's decisionmaking.[6] Amended Complaint ¶ 6 (J.A. 24-25). In support of these allegations, NWF submitted the sworn declaration of its then Vice President for Resources Conservation Lynn A. Greenwalt. According to Mr. Greenwalt, NWF has been denied the "opportunity to see and use" the kind of information that would have been available had the Department completed EISs on the Program and the actions completed under its aegis. Declaration of Lynn A. Greenwalt (May 16, 1986) ¶¶ 2-5 (Gov. App. 193a-94a). Mr. Greenwalt also attests that, as a result, NWF's ability to fulfill its obligations to its members who "have contributed financially to the organization, in part, so that they may obtain adequate representation of their legally-protected environmental interests" has been damaged. *Id.* at ¶ 4 (Gov. App. 194a).

On June 17, 1986, federal defendants served subpoenas on NWF seeking to take fifteen depositions in eleven western states and the District of Columbia.[7] The

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[6] FLPMA specifically requires public participation in the land management decisions of the Department. *See, e.g.*, 43 U.S.C §§ 1712(f), 1739(e).

[7] The Secretary's statement of the case indicates that these subpoenas were served following the court of appeals' decision sustaining the preliminary injunction. Gov. Br. at 11-12. This is incorrect.

admitted purpose of these depositions was to demonstrate that NWF could not prove standing to bring this action. NWF moved for a protective order, arguing that it had already produced the affidavits of Ms. Peterson, Mr. Erman, and Mr. Greenwalt proving its standing; and, therefore, additional discovery as to this issue would be unreasonably cumulative within the meaning of Fed. R. Civ. P. 26(c)(1). The district court agreed and issued the requested protective order. (Gov. App. 170a).

NWF moved for summary judgment on June 23, 1986. In their cross-motion, federal defendants again raised the standing of NWF and Mountain States filed yet another motion to dismiss NWF's claims. No defendant challenged the standing of the congressional intervenor.

In December 1987, the court of appeals sustained the district court's preliminary injunction. (Gov. App. at 38a). The majority opinion specifically held that NWF had standing to proceed. (*Id.* at 56a). In his opinion concurring on standing, Judge Williams applied the circuit's criteria for proof of standing on summary judgment as set forth in *Wilderness Society v. Griles*, 824 F.2d 4 (D.C. Cir. 1987), and concluded that:

> the issue of standing is largely academic . . . By the time the case was submitted to this court, the defendants appear to have conceded the bare minimum necessary for standing.

(Gov. App. 85a). The court of appeals denied defendants' petitions for rehearing. (*Id.* at 116a).

Six months after the preliminary injunction was upheld and nearly two years after the motions had been filed, the district court heard oral argument on summary

judgment. At the close of argument on the motions, the district court ordered the case submitted except as to standing and requested additional memoranda from both sides on that issue. Order (July 28, 1988) (J.A. 345). In compliance with the district court's directive, NWF filed a memorandum on its standing that included five supplemental declarations. These declarations are by members of NWF who use federal lands that have been affected by the Program and whose continued use and enjoyment of those lands are threatened by the Department's actions. (Respondent's Appendix [hereinafter R.A.]).

David Doran recreates quite extensively on the federal lands near Coos Bay, Oregon. On April 24, 1984, the Department terminated two protective withdrawals and opened 1500 acres of land on which Mr. Doran recreates to disposal under the public land laws. Declaration of David Doran, ¶ 8 (R.A. 2); 49 Fed. Reg. 17502 (April 24, 1984). The Department proposes to dispose of these lands for the "development of a marine industrial park." Affidavit of Joseph J. Martyak, December 16, 1985, ¶ 24(a) (J.A. 146-47). As a result, lands which currently provide habitat for the endangered snowy plover and peregrine falcon, and birdwatching opportunities for Mr. Doran, will be cleared and paved. Declaration of David Doran ¶ 5 (R.A. 2).

Merlin McColm resides in Elko, Nevada and uses many of the public lands in Nevada for recreation. Areas adjacent to the Roberts and Tuscarora Mountains frequented by Mr. McColm have been opened to mining and other forms of development by the Department. Declaration of Merlin McColm, ¶ 7 (R.A. 5); *see also* 47 Fed. Reg. 6851 (February 17, 1982); 47 Fed. Reg. 7236 (February 18,

1982). He has already observed the ecological damage stemming from these actions in the form of "sedimentation from mining runoff and direct habitat destruction." *Id.*[8]

Stephen Blomeke is an avid hunter and travels "considerable distances across the state of Colorado to access areas containing prime habitat" for game species. Declaration of Stephen Blomeke, ¶ 5 (R.A. 8). In doing so, he uses numerous federal campgrounds and recreation areas. *Id.* Pursuant to the Department's Program, many of these public areas have been opened to disposal and development. *Id.* at ¶¶ 8-10 (R.A. 8-9); *see also* 47 Fed. Reg. 7414-423 (February 19, 1982). Prior to the issuance of the injunction in this case, twenty-five mining claims already had been staked on campgrounds frequented by Mr. Blomeke. Exhibit 11A to Edwards Affidavit 1A (J.A. 86).

Will Ouellette lives in rural New Mexico and uses the federal lands in the surrounding countryside on a daily basis. Declaration of A.L. Ouellette, ¶¶ 1-5 (R.A. 11-12). Many of the areas he uses, including the Tent Rocks Recreation Area, have been opened to disposal and development by the termination of protective land classifications. *Id.* at ¶ 9 (R.A. 12-13). The Tent Rocks area of New Mexico is a unique environment. "Comparable formations are found only in Turkey." Bureau of Land Management, *Di[illegible] Rio*

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[8] According to federal defendants' own submissions, three mining claims have been staked on 80 acres previously protected by these withdrawals. Exhibit 11A to Edwards Affidavit 1A (J.A. 89). All three were staked the year the lands were opened. *Id.* No mining claims were staked the previous two years. *Id.*

Puerco Resource Management Plan and Environmental Impact Statement at C-30 (1985) (attached as Appendix III to Declaration of A.L. Ouellette). Yet, the Department terminated the classifications that protected these lands for public enjoyment and recreation, to the detriment of Mr. Ouellette as well as many others.

In addition, Ms. Peterson supplemented her earlier affidavit. In her supplemental declaration, she identifies in detail the challenged actions responsible for her injury and provides an example of a specific proposal to develop a uranium mine on lands which previously had provided Ms. Peterson with undisturbed wildlife habitats for hiking, camping, hunting, and fishing. (R.A. 16).

In their responsive memoranda, defendants produced no evidence to contradict the statements in these supplemental declarations.

The district court summarily rejected NWF's supplemental declarations as untimely and "violative of its order;" reversed its previous rulings on NWF's standing; dismissed the entire case, including the unheard claims of Congressman Vento; and dissolved the preliminary injunction.

At this point, NWF appealed. A three-judge panel of the court of appeals unanimously reversed the holding of the district court on three separate grounds:

> (1) that the affidavits submitted by NWF in support of its motion for summary judgment "clearly alleged facts showing that its members were 'among the persons injured' by [the Department of the] Interior," (Gov. App. 15a);

(2) that since these same affidavits had provided "adequate grounds for NWF to establish irreparable harm" for a preliminary injunction, they also demonstrated sufficient injury-in-fact to support the test of standing, and the court of appeals' previous opinion upholding the preliminary injunction was law of the case on this issue, (*id.* at 19a); and

(3) that the equities of this case "unquestionably compel an allowance" on the part of NWF to supplement the record to cure any alleged defects on standing, and that NWF's supplemental declarations "easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests," (*id.* at 21a).

The court of appeals then remanded the case for disposition on the merits. Because it directed the district court to address NWF's substantive claims "with dispatch," the court of appeals did not reinstate the preliminary injunction. (*Id.* at 25a).

The petitions for *certiorari* filed by the Secretary and Mountain States seek review of this decision.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any federal court of appeals. Indeed, the Secretary alleges no such conflict. Moreover, the issues raised by petitioners are not of such exceptional importance as to justify review by this Court, especially in light of the essentially factual character of the petitioners' questions for review. Accordingly, a writ of *certiorari* is unwarranted.

I. THE DECISION OF THE COURT OF APPEALS IS CORRECT AND IS CONSISTENT WITH THIS COURT'S REQUIREMENTS FOR FEDERAL STANDING.

In two separate opinions, unanimous panels of the court of appeals determined that NWF has standing to pursue this litigation. This holding does not represent a departure from existing standing law but rather falls squarely within its tenets. Indeed, petitioners do not charge that the holding in this case conflicts with the decision of another court of appeals; nor can they point to a divergence from controlling Supreme Court precedent.

A. The Court of Appeals' Decision is Consistent with Prior Supreme Court Precedent

This Court summarized the constitutional requirements of standing in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), as follows:

> at an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, (1976).

Id. at 472. It is the first of these thresholds, or the "injury-in-fact" requirement, that is at issue in the instant case.

(Gov. App. 12a). Following the guidance of the Court's prior opinions, that injury must be "distinct and palpable," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), yet it need not be great; an "identifiable trifle" will suffice, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973); and standing extends to those who show some type of environmental injury, *id.* at 686; *see also Japan Whaling Association v. American Cetacean Soc.*, 478 U.S. 221, 231 n.4 (1986).

The requirements for establishing standing in cases involving such environmental injury are well-settled. Thus, in *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), this Court denied standing to the Sierra Club on its allegation that the government's decision to permit development in a national park would "destroy or . . . adversely affect" the natural resources in the park and would "impair . . . enjoyment . . . for future generations." The Court acknowledged that this was a cognizable injury but found that it did not amount to injury-in-fact sufficient to uphold standing because the Sierra Club had "failed to allege that it or its members would be affected in any of their activities or pastimes by the . . . development." *Id.* at 734-35. In *SCRAP*, however, the Court found that the plaintiff organizations had alleged sufficient injury to establish standing to challenge an ICC rate increase. The plaintiffs in *SCRAP* asserted that their members used "the forests, rivers, streams, mountains, and other natural resources in the Washington Metropolitan area" for various recreational and aesthetic purposes and that these uses would be adversely affected by the challenged conduct. *SCRAP*, 412 U.S. at 678.

In the instant case, NWF alleged in its complaint that its members "use and enjoy the environmental resources that will be adversely affected" by the challenged Program. Amended Complaint ¶ 6 (J.A. 25). As evidence in support of these allegations, NWF initially submitted the affidavits of Ms. Peterson and Mr. Erman. Both Ms. Peterson and Mr. Erman, as members of NWF, state that their "recreational use and aesthetic enjoyment" of particular federal lands will be adversely affected by the decision to open them "to the staking of mining claims and oil and gas leasing" and that mining or oil and gas development "threatens the aesthetic beauty and wildlife habitat potential of these lands." (Gov. App. 187a-92a). Their affidavits use the phrase "in the vicinity" to describe in lay terms the location of the tracts at issue.[9] Both Ms.

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[9] There is no evidence in the record to support the Secretary's claims that the area of land in the vicinity of South Pass/Green Mountain, Wyoming on which Ms. Peterson states she recreates constitutes over two million acres. Gov. Br. at 20. Ms. Peterson's affidavit contains no such statement. The Department's own documents describe the federal land holdings in South Pass and Green Mountain as 14,000 and 126,000 acres, respectively. Department of the Interior, Draft Lander Resource Management Plan/EIS (1986). Ms. Peterson specifically limits her injury only to those unique tracts of federal land within South Pass/Green Mountain that have been opened to mining and mineral leasing by the Department. Affidavit of Peggy Kay Peterson at ¶ 6 (Gov. App. 191a).

The five million acre figure for Mr. Erman's recreational use in the Arizona Strip is also a gross exaggeration. Gov. Br. at 9. Mr. Erman's affidavit contains no such figure and neither does the affidavit of G. William Lamb on which the Secretary relies.

Peterson and Mr. Erman specifically state that they are injured by the opening of lands they use to private mineral development.[10]

The Secretary's attempt to distinguish *SCRAP* is unavailing. Gov. Br. at 20. Like the instant case, *SCRAP* was a challenge to government action with nationwide effects. Standing to challenge an ICC freight rate increase was founded upon individual allegations of use of the natural resources in the Washington metropolitan area. Similarly, NWF's complaint alleges use of environmental resources placed at risk by government action and NWF's affidavits provide direct evidence of the use of threatened natural areas by its members.

The court of appeals correctly interpreted Ms. Peterson's affidavit to demonstrate that NWF's "members were 'among the persons injured' " by the Department's challenged actions. (Gov. App. 15a). The court of appeals did not, as the Secretary suggests, "presume" that a "mere claim of standing necessarily implies a factual basis to support it." Gov. Br. at 21. Indeed, drawing on *dicta* in this Court's *SCRAP* decision, the District of Columbia Circuit has adopted a stringent standard for proof of standing at the summary judgment stage. *Wilderness Society v. Griles*, 824 F.2d at 16. To accomplish the required showing, NWF had to: (1) identify lands that are

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[10] If there was any doubt that Ms. Peterson uses lands actually affected by the Department's Program to terminate classifications and withdrawals, it was resolved by her supplemental declaration in which Ms. Peterson identifies the precise classification terminations that will impair her use of federal lands. Declaration of Peggy Kay Peterson ¶ 7-9 (R.A. 16-17).

affected by the challenged government action; (2) demonstrate that third parties are likely to respond to that government action with development activites; and (3) identify members in specific areas that would suffer an adverse impact from such third-party conduct. *Id.* at 10-12. The court of appeals reviewed the evidence contained in Ms. Peterson's affidavit, as well as other evidence in the record, and drew the only logical inference available to it, *i.e.*, that Ms. Peterson, in fact, is injured by the Department's actions.

Having determined that Ms. Peterson's affidavit was sufficient to demonstrate NWF's standing, the court of appeals declined to address the affidavit of Mr. Erman.[11] (Gov. App. 18a). It summarily reaffirmed its prior rejection of the argument raised by Mountain States below, and resurrected by the Secretary in his petition, that NWF must prove that it is injured by each action completed under the auspices of the Program and on every acre of federal land affected in order to challenge the Program itself. (*Id.* at 16a). The court of appeals based its rejection of this argument upon controlling precedents of this Court set forth in *International Union, United Automobile,*

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[11] The court of appeals also declined to discuss the injury to the organization itself described in Mr. Greenwalt's declaration. This Court's recent opinion in *Public Citizen v. U.S. Department of Justice*, 109 S. Ct. 2558, 2563-64 (1989), however, specifically recognizes that the denial of information or lawful participation constitutes injury for purposes of standing. Mr. Greenwalt's declaration establishes that NWF has been injured by the denial of the kind of information normally included in EISs prepared under NEPA. (Gov. App. 194a).

Aerospace and Agricultural Implement Workers of America v. Brock, 477 U.S. 274 (1986), and *Warth v. Seldin*, 422 U.S. 490.[12] (Gov. App. 55a).

In sum, there is no important question of federal law at issue in this case that requires the intercession of the Supreme Court. The Secretary's petition reduces to a dispute over the court of appeals' interpretation of Ms. Peterson's original affidavit. According to the Secretary, neither Ms. Peterson nor Mr. Erman claim to use lands actually affected by the challenged Program, only lands "in the vicinity" and the court of appeals, therefore, misinterpreted Ms. Peterson's original affidavit. Gov. Br. at 20. Under any circumstances, this alleged misreading of Ms. Peterson's affidavit would rarely warrant the scrutiny of the Supreme Court.[13] In light of the clarification

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[12] In the *International Union* case, for example, the plaintiff labor union gained standing to challenge the Department of Labor's nationwide policy regarding eligibility for unemployment benefits on the basis of injury to any *one* of the union's members. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. at 281-91.

[13] This is particularly so since, in order to review this dispute, the Court will have to wade through the evidence presented by both sides and determine the factual content of NWF's affidavits and exhibits as well as those submitted by defendants. Moreover, in considering this question on summary judgment, the Court must, first, believe NWF's evidence and, second, resolve all justifiable inferences in NWF's favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Even read in a manner exceedingly favorable to defendants and unaided by Ms. Peterson's supplemental declaration, the phrase "in the vicinity of" is, at most, ambiguous on the issue of whether Ms.

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provided by Ms. Peterson herself in her supplemental declaration, however, the Secretary's assertions are singularly undeserving of the Court's attention. In her supplemental declaration, Ms. Peterson identifies the precise actions by the Department that will impact her use of federal lands by opening them to mining. She also identifies a specific proposal to "mine a significant portion of the federal lands which I use for recreational purposes and for aesthetic enjoyment." Declaration of Peggy Kay Peterson ¶ 7-9 (R.A. 16-17). The court of appeals' conclusion that Ms. Peterson, in fact, is injured by the actions of the Department is inescapable upon a cursory reading of this declaration.

B. The Court of Appeals' Decision to Permit Supplementation of the Record is Correct

As the court of appeals noted, "[n]o party to this litigation seriously disputes that NWF's supplemental affidavits, if considered, easily satisfy the level of specificity needed for standing under any of the Supreme Court's articulated tests." (Gov. App. 21a). Instead, the Secretary asks the Court to place an embargo on any

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Peterson's recreational use extends to lands affected by the challenged actions. Given the presumptions established by the summary judgment rules, this ambiguity must be resolved in favor of Ms. Peterson and NWF. *Id.*

The instant case is not comparable to *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In *Celotex*, the plaintiff offered no evidence whatsoever in opposition to the defendants' motion for summary judgment. In contrast, NWF submitted several member affidavits, as well as the Department's own documents, *see* discussion *supra* pp. 6-7, in support of its standing. NWF also proffered additional evidence.

supplementation of the factual record on standing in a case which has not yet gone to trial.[14] Such a holding would be inconsistent with prior Supreme Court precedent. This Court repeatedly has remanded cases to permit supplementation of the factual allegations in support of standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377-78 (1982); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 55 n.6 (1976); *Warth v. Seldin*, 422 U.S. at 501-02; *Sierra Club v. Morton*, 405 U.S. at 735 n.8.

It would also be wasteful of judicial resources to require the dismissal and re-filing of cases involving curable jurisdictional defects. *See Costello v. United States*, 365 U.S. 265 (1961). The Department's Program is ongoing. NWF can re-file its complaint and cure any alleged deficiency on standing by submitting evidence of the continuing injury its members and the organization suffer as the result of the Department's actions.

Moreover, to dismiss the instant case on the basis of such a ruling would be a gross injustice. Prior to its order

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[14] The Secretary's argument that any supplementation of the record is improper is founded on a narrow reading of Fed. R. Civ. P. 56(c) requiring the service of summary judgment materials "prior to the day of the hearing." Yet, defendants were permitted to introduce new evidence concerning the substantive merits of their case at oral argument, in violation of the strict letter of Fed. R. Civ. P. 56(c). Transcript at 55-56, 92. (J.A. 307-08, 344). NWF should have been afforded an opportunity to respond.

Moreover, the district court requested additional submissions from both sides on the standing issue only after oral argument.

dismissing the case, the district court previously issued three orders upholding NWF's standing. No one challenged the standing of NWF's co-plaintiff in the case, Congressman Bruce F. Vento.[15] The court of appeals sustained the issuance of a preliminary injunction holding that NWF had proved irreparable harm to its members. (Gov. App. 78a). The court of appeals unanimously upheld NWF's standing to bring the suit. Defendants did not seek review of that decision. No change in either the factual situation or this Court's dispositions on standing was brought to the attention of the district court. In short, NWF had no reason to believe that its standing was still at issue until suddenly, at the close of oral argument on cross-motions for summary judgment, the district court indicated that it wanted additional submissions on standing. (Gov. App. 20a). In response to the court's request, NWF submitted a memorandum with supporting declarations. Defendants had a full opportunity to refute the evidence in those declarations. (*Id.* at 21a). Under these rather unusual circumstances, the court of appeals properly found that the district court should have permitted NWF to submit additional evidence in support of standing prior to dismissing the case for lack of jurisdiction. On the basis of these supplemental declarations, NWF's standing is irrefutable.

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[15] NWF's co-plaintiff, Congressman Bruce F. Vento did not join in NWF's motion for summary judgment and his standing was not addressed in the district court's opinion dismissing the case. If Mr. Vento has standing to pursue this litigation, then a separate basis for NWF's standing is unnecessary. *Watt v. Energy Action Education Foundation*, 454 U.S. 151, 160 (1981). The district court upheld the Congressman's standing twice prior to dismissing the case. *See* discussion *supra* pp. 4-5.

II. FEDERAL PROGRAMS ARE NOT IMMUNE TO CHALLENGE IN THE COURTS

Both petitioners contend that the Department's actions at issue in this case are somehow insulated from judicial review. The Secretary suggests that the court of appeals' grant of standing in this case violates the separation of powers clause of the Constitution, but he cites no caselaw to support this theory.[16] Mountain States, citing *Ashwander v. TVA*, 297 U.S. 288 (1936), and *Allen v. Wright*, 468 U.S. 737 (1984), alleges that this Court has precluded challenges to government programs or policies, including NWF's challenge to the Department's Land Withdrawal Review Program. Both arguments are untenable. They cannot be reconciled with this Court's prior decisions on standing.

A. The Court of Appeals' Standing Decision Does Not Violate the Separation of Powers Clause

The Secretary contends that this litigation will necessarily transform a single district court judge into a "national land use czar," Gov. Br. at 22; and, therefore, standing to challenge the Department's actions must be denied in order to avoid a violation of the separation of powers clause of the Constitution. This contention is totally unfounded.

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[16] Indeed, as Judge Bork noted in his opinion in *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987):

> the Supreme Court has never said explicitly that the separation of powers clause concept leads it to deny [standing] where it otherwise might be found . . . .

Id. at 807.

NWF is not "seeking judicial supervision of the Secretary's entire administration, throughout the Nation, of his duties under FLPMA." Gov. Br. at 23. Instead, like the plaintiffs in *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983), who sought compliance with the reporting requirements of NEPA, NWF is asking only that the "agency conform[] with controlling statutes." As such, this litigation is not so "overwhelming" as the Secretary suggests. Gov. Br. at 22. In fact, it is currently submitted for final adjudication on cross-motions for summary judgment.

Further, the source of the alleged violation of the separation of powers clause cited by the Secretary is not the court of appeals' recent standing decision but rather the preliminary injunction upheld by the court of appeals nearly two years ago. The Department chose not to seek review of that decision; perhaps because the vast majority of the Department's activities were unimpeded by the injunction. As the district court made clear:

> activities that would have been permitted on the affected public lands under the previous withdrawals and classifications prior to revocation or termination may still take place.

(Gov. App. 146a). These same withdrawals and classifications were originated by the Department and were in effect for decades prior to their termination. The effect of the court's preliminary injunction was merely to reinstate these withdrawals and classifications.

The preliminary injunction subsequently has been dissolved. However, in the three years it was in place, only four individuals intervened in the case seeking an

exemption from its provisions.[17] The Department itself never sought prior permission of the district court to proceed with any individual management action.

In its request for permanent relief, NWF merely prays that the Department's actions be conducted in accordance with statutory requirements, including, for example, the completion of EISs under NEPA. That this task may prove burdensome to the Department, according to the Secretary, hardly relieves the agency of its statutory obligations; nor does it remove the jurisdiction of the federal courts to review NWF's claims.[18]

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[17] In three instances, it was the Department's own overbroad interpretation of the injunction that required the intercession of the district court. *See, e.g.*, Order (January 6, 1987) ("the preliminary injunction . . . does not apply to the geothermal operations of the Department of Water and Power for the City of Los Angeles . . . [and the Department] shall forthwith vacate and set aside its suspension order . . . ") (Gov. App. 165a-66a).

[18] Under the APA, agency action is judicially reviewable:

> except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.

5 U.S.C. § 701(a). Over the years, this Court has emphasized that this is a very narrow exemption. As the Court explained in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), the reason for this rule is that:

> [w]e ordinarily presume that Congress intends the executive to obey its statutory commands and, accordingly, that it expects the courts to grant relief when an executive agency violates such a command.

Id. at 681.

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B. Standing to Challenge Government Programs Has Not Been Abolished

Mountain States' suggestion that this Court essentially has eliminated all challenges to government programs is baseless. Neither *Ashwander v. TVA*, 297 U.S. 288, nor *Allen v. Wright*, 468 U.S. 737, provides support for this proposition.

In *Ashwander v. TVA*, shareholders of the Alabama Power Company brought a challenge to the constitutionality of the "Tennessee Valley Authority Act in all its bearings" based upon the execution of a single contract with the Alabama Power Company. 297 U.S. at 325. The plaintiffs also sought to have the Court issue a "decision of abstract questions as to the right of the Authority and of the Alabama Power Company in possible contingencies." *Id.* This Court sustained the circuit court's determination to limit the plaintiffs' challenge to the validity of the contract itself, finding that the plaintiffs' other claims were founded "merely upon 'assumed potential invasions' of rights . . . ." *Id.* at 324-25 (quoting *Arizona v. California*, 283 U.S. 423, 462 (1931)).

The United States Court of Appeals for the District of Columbia Circuit explained and applied *Ashwander v.*

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Moreover, this is not a case like *Webster v. Doe*, 108 S. Ct 2047, 2052 (1988), in which the applicable statutory standard "exudes deference" to the agency and thus "foreclose[s] the application of any meaningful judicial standard of review." The Secretary can make no claim that such unbridled discretion is available to him under the applicable provisions of FLPMA and NEPA. *See, e.g.*, NEPA § 102, 42 U.S.C. § 4332 ("all agencies of the Federal Government shall include . . . a detailed statement . . . on the environmental impact of the proposed action . . . .")

TVA in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission (SIPI)*, 481 F.2d 1079 (1973), commenting that *Ashwander* stands for the unsurprising proposition that:

> [t]raditional principles of ripeness dictate that judicial review be reserved for problems which are real and present, not hypothetical and remote.

Id. at 1087 n.29.[19] The court of appeals in *SIPI* went on to hold that even though the liquid metal cooled fast breeder reactor [LMFBR] program at issue in *SIPI* was "in the research and development stage and no specific implementing action which would affect the environment had yet been taken," the program was of sufficient "definite and concrete character" to overcome the *Ashwander* concerns. *Id.* Thus, the distinguishing factor in *SIPI* was the lack of abstract questions, not the number of proposed actions, as Mountain States contends.[20] Mountain States Legal Foundation's Petition for a Writ of Certiorari [hereinafter MSLF Br.] at 12.

In the instant case, the challenged program also has found sufficient "fruition in action of a definite and

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[19] *Compare Duke Power v. Carolina Environmental Study Group*, 438 U.S. 59 (1978) (plaintiffs living in proximity to proposed nuclear facilities were held to have standing to challenge the constitutionality of the Price-Anderson Act.)

[20] Mountain States' description of *SIPI* is simply incorrect. The goal of the LMFBR program was to develop new nuclear reactor technology for "widespread deployment," not merely to build a single facility. *SIPI*, 481 F.2d at 1082.

concrete character" to be ripe for review. *Ashwander v. TVA*, 297 U.S. at 324. By its own admission, the Department has already completed several hundred terminations of withdrawals and classifications under the auspices of the Program and, as a direct result, mining claims have been staked and oil and gas leases issued. Affidavit of Joseph J. Martyak (December 16, 1985) (J.A. 119-59). NWF need not wait until each of the Program's proposed activities are completed to seek review of the Department's legal failures regarding the formulation and implementation of the Program.

Mountain States' discussion of the Court's holding in *Allen v. Wright*, 468 U.S. 737, is also wrong. The case does not support Mountain States' sweeping statement that this Court has eliminated standing to challenge government programs. This Court and other federal courts have upheld numerous legal challenges to government action on a programmatic scale.[21] As the court of appeals

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[21] *See, e.g., International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. at 281-91 (union had standing to pursue across-the-board challenge to Department of Labor policy on eligibility for trade readjustment allowance benefits on the basis of injury to any one of union's members); *Blum v. Yaretsky*, 457 U.S. 991 (1982), (Gray Panthers organization and patients in skilled nursing facilities had standing to challenge New York State's Medicaid program which denied benefits to patients recommended for transfer to facilities providing a reduced level of care); *Watt v. Energy Action Education Foundation*, 454 U.S. 151 (challenge to the federal government's five-year offshore mineral leasing program; standing upheld to seek review of the

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recognized, Mountain States' suggestion that NWF ought to file separate challenges to each of the hundreds of actions completed under the Program at issue in this case, MSLF Br. at 12, is both "unsupported by caselaw" and "illogical." (Gov. App. 55a-56a). NWF is challenging a "pattern of practice embodied in the Department's conduct of its Program." (*id.*); *see NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 158 (1st Cir. 1987). The mere fact that separate decision notices of each termination were issued by the Department is irrelevant when, as NWF alleges, each decision to terminate individual classifications and withdrawals was guided by

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Secretary of the Interior's choice of bidding systems for lease issuance); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (without passing on standing, the Court heard a challenge to the validity of an FCC policy statement that had not yet been applied to any set of facts); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S 150 (1970) (sellers of data processing services had standing to challenge a ruling of the Comptroller of the Currency allowing national banks to provide such services); *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (8th Cir. 1988), (environmental organizations had standing to challenge the Secretary of the Interior's determination that all federally-funded projects in foreign countries were exempt from the consultation provisions of the Endangered Species Act, 16 U.S.C. § 1536(a)(2) (1982)); *Oregon Environmental Council v. Kunzman*, 817 F.2d 484 (9th Cir. 1987) (environmental organizations had standing to challenge the nationwide pesticide spraying program of the U.S. Forest Service); and *National Wildlife Federation v. Hodel*, 839 F.2d 694 (D.C. Cir. 1986) (environmental organizations had standing to challenge the national regulatory program of the federal Office of Surface Mining).

unlawful directives at the Program level.[22] It makes little sense either for coherent management of the federal lands or for the exigencies of the federal court system to force multiple lawsuits challenging these same violations of law.[23]

The Court's opinion in *Allen v. Wright* does not require such an irrational result. The opinion in *Allen v. Wright* holds that where a plaintiff cannot show that his injury is "fairly traceable" to the challenged actions of a government program, the separation of powers clause of the Constitution prohibits a grant of standing. *Id.* at 761 n.26. The plaintiffs in *Allen v. Wright* were challenging the tax-exempt status of racially discriminatory schools. The

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[22] For example, NWF is seeking the preparation of a programmatic EIS under NEPA in accordance with this Court's decision in *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

Mountain States attempts to distinguish the instant case from *Kleppe* by arguing that the Program at issue will have no cumulative impacts. MSLF Br. at 12-13. This is a merits question that has little bearing on NWF's standing. Furthermore, the Program will determine the legal status of millions of acres of federal lands. The impact of such massive shifts in land use will be profound. Indeed, Mountain States itself has identified a range of environmental impacts stemming from the Program, *id.*; none of which was analyzed in the context of an EIS. For example, the Program already has opened two million acres of land in the Colorado watershed to mineral and agricultural development. Yet, the cumulative effects of this development on the watershed were never considered.

[23] This piecemeal litigation would provide no opportunity for the Department to correct any generic deficiencies in the conduct of its Program and to proceed lawfully with respect to future actions. Instead it would require the courts to undo each and every withdrawal and classification termination.

majority found the chain of causation between the plaintiffs' injury, the diminished availability of a desegregated education, and the defendants' actions, the tax exemptions, to be too attenuated to confer standing.

The instant case presents *no* similar facts. Should the court in the instant case order the Department to prepare EISs in compliance with the provisions of NEPA, the Department presumably will comply with the court's order and NWF will receive the information on environmental impacts it has thus far been denied. Moreover, the withdrawals and classifications which the Department seeks to eliminate represent an absolute bar to specified uses of federal lands. If the withdrawals and classifications at issue in the instant case are continued, the Court is entitled to assume that third parties will act lawfully and will not initiate development activities on lands that are closed to them and that, therefore, NWF's members' use of those lands will not be impaired. Under these circumstances, a determination that plaintiffs have standing is wholly proper. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. at 45 n.25 (standing to challenge government action is proper where third party conduct would have been illegal absent government action).

Finally, Mountain States seeks to convey the impression that this case inevitably must have radical and unusual impacts on third parties. This simply is not so. Litigation often has impacts on individuals who are not parties. Contrary to Mountain States' assertions, however, the instant case need have no impact at all on those individuals who relied on the actions of the Department and who acquired title to federal lands prior to the filing

of NWF's complaint. MSLF Br. at 13-15. There is no cloud on their title. NWF has not asked the district court to invalidate pre-existing mining claims or mineral leases or to overturn completed sales or exchanges of previously withdrawn lands. (Gov. App. 145a). In its request for a preliminary injunction, NWF merely sought the preservation of the *status quo* by preventing the staking of new mining claims, the issuance of additional mineral leases, and the loss of additional public lands to private interests during the pendency of this litigation. Similarly, NWF's request for permanent relief merely asks that the same *status quo* be maintained until the Department has complied with the statutory requirements for opening these lands.

This is not a draconian request. Investment uncertainty is nothing new for would-be mining claimants and mineral leaseholders, just as it is nothing new for persons who wish to consummate other land transactions with the Department, or to obtain permits or other authorizations for private activities on public lands. Such persons hold no more than an expectancy of government largess, with no assurance that government benefits will be forthcoming.[24]

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[24] *See, e.g., Lewis v. Hickel*, 427 F.2d 673 (9th Cir. 1970) (rejection of land exchange based upon adoption of new regulations was proper; until lands are patented, transaction constitutes nothing more than a proposal under which no contract rights arise); *Winkler v. Andrus*, 614 F.2d 707 (10th Cir. 1980) (Secretary of the Interior has broad authority to cancel leases for administrative errors); *Ideal Basic Industries, Inc. v. Morton*, 542 F.2d 1364 (9th Cir. 1976) (Secretary of the Interior has

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In any event, the court of appeals' decision is interlocutory. There is no final decree in this case. What the eventual outcome may be is unknown at this time. In the interim, mere speculation about the relief that ultimately might be granted should not act as a bar to any adjudication of NWF's claims. Full consideration of all the equities involved necessarily will precede the issuance of any permanent injunction. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982).

CONCLUSION

For the reasons stated above, the petitions for writs of *certiorari* should be denied.

Respectfully Submitted,

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December, 1989

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continuing jurisdiction with respect to public lands and he is not estopped by principles of the finality of administrative action from correcting an erroneous decision made by his subordinates or predecessors).

Nos. 89-628, 89-640

In The

Supreme Court of the United States

October Term, 1989

MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

NATIONAL WILDLIFE FEDERATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

APPENDIX TO BRIEF IN OPPOSITION OF RESPONDENT NATIONAL WILDLIFE FEDERATION

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff, v. ROBERT F. BURFORD, *et al.*, Defendants.	)	Civil Action No. 85-2238-JHP

DECLARATION OF DAVID DORAN

Declarant, DAVID DORAN, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF) and its affiliate the Oregon Wildlife Federation (OWF).

2. I reside at 2753 N. 32nd, Springfield, Oregon 97477.

3. I frequently use the public lands, in particular, I use the federal lands adjacent to Coos Bay located along the south-central coast of Oregon. These lands are administered by the Bureau of Land Management (Bureau) and the U. S. Department of the Interior (Department).

4. My uses of these federal lands include hunting, fishing, camping and hiking. I pursue these activities for recreational purposes and aesthetic enjoyment. I hunt both elk and black tail deer on these federal lands located along the north spit of Coos Bay and fish off coastal areas which are also located on, or which can only be accessed

through, these federal lands. I derive substaintial benifits (sic) of food and sport from such hunting and fishing.

5. I also hike and camp on these federal lands along the northern and southern spits of Coos Bay. From these activities I benifit (sic) through aesthetic enjoyment of the rich natural beauty of these lands and the interesting and diverse species of wildlife which inhabit the Coos Bay habitat. Several of the bird species I have viewed, such as the snowy plover (a state listed endangered species) and peregrine falcon, are quite rare with a substantial percentage of their population inhabiting the federal lands adjacent to Coos Bay.

6. I am aware that my continued recreational and aesthetic enjoyment of the Coos Bay lands depends upon their being managed by the Bureau and Department in full compliance with the laws pertaining to the preservation and protection of the federal lands they administer.

7. I am also aware that the National Wildlife Federation has filed a lawsuit against the Bureau and the Department for unlawfully revoking protective land withdrawals and unlawfully terminating protective land classifications on the public lands pursuant to the Department's Land Withdrawal Review Program.

8. Among the Departmental actions challenged in the NWF lawsuit is the decision to revoke Secretarial Orders of December 13, 1887, and September 20, 1890, which opened 1,558 acres of land which I use to surface entry and mining. This revocation also made 47 acres of land which I use available for disposal by exchange. 49 Fed. Reg. 17502.

9. These unlawful actions of the Bureau and the Department adversely affect my interest in recreational use and aesthetic enjoyment of the federal lands by opening these lands to development activities which threaten the aesthetic beauty and wildlife habitat of these lands. These actions also adversely affect my interest in seeing that the Bureau and Department fully comply with the laws pertaining to the preservation and protection of natural resources on the federal lands they administer.

10. My interests are being fully and adequately reqresented (sic) by the NWF in its lawsuit against the Bureau and the Department and my above stated injuries will be fairly redressed by a decision favorable to NWF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 18, 1988.

/s/ David W. Doran
DAVID DORAN

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff, v. ROBERT F. BURFORD, *et al.*, Defendants.	)	Civil Action No. 85-2238-JHP

DECLARATION OF MERLIN McCOLM

Declarant, MERLIN McCOLM, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF).

2. I reside in Elko, Nevada. My address is P.O. Box 1362, Elko, Nevada 89801.

3. I use the public lands extensively. In particular, I use the federal lands administered by the Bureau of Land Management (Bureau) and the Department of the Interior (Department). I have used and I continue to use such federal lands located throughout the state of Nevada and elsewhere. Particular areas which I use frequently include the Roberts Mountains south of Elko and the Tuscarora Mountains and Independence Range to the northwest of Elko.

4. My use of these public lands is for purposes of recreation and aesthetic enjoyment. I hunt deer, antelope, sage

grouse and other game species for sport and food, and often travel to particular tracts of the above mentioned federal lands where habitats for these species are known to exist.

5. My recreational and aesthetic enjoyment of these lands depends upon their being managed by the Bureau and Department in full compliance with the laws pertaining to the preservation and protection of the federal lands they administer.

6. I am aware that the National Wildlife Federation has filed a lawsuit against the Bureau and the Department for unlawfully revoking protective land withdrawals and unlawfully terminating protective land classifications on the public lands pursuant to the Department's Land Withdrawal Review Program.

7. Pursuant to this unlawful Program, the Bureau and Department has revoked withdrawals and terminated classifications covering specific areas which I use for the above stated recreational and aesthetic purposes. For example, areas adjacent to the Roberts and Tuscarora Mountains which I use (and which have been protected as water reserves under Executive Orders dated February 8, 1923 and November 20, 1925) have been opened to mining and other forms of development by means of these unlawful actions by the Bureau and Department. 47 Fed. Reg. 6851, 7236. I have since personally observed evidence of ecological damage to these areas and others in the form of sedimentation from mining runoff and direct habitat destruction.

8. These unlawful actions by the Bureau and the Department have resulted in actual injury to my recreational use

and aesthetic enjoyment of these federal lands. By opening many specific areas which I use to the staking of mining claims, oil and gas leasing and other forms of development, such actions injure my enjoyment of these lands by threatening the aesthetic beauty and wildlife habitat potential of these lands.

9. These unlawful actions of the Bureau and the Department adversely affect my interest in recreational use and aesthetic enjoyment of the federal lands, and adversely affect my interest in seeing that the Bureau and Department fully comply with the laws pertaining to the preservation and protection of the federal lands and their natural resources.

10. My interests are being fully and adequately represented by the NWF in its lawsuit against the Bureau and the Department and my above stated injuries will be fairly redressed by a decision favorable to NWF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 16, 1988.

/s/ Merlin McColm
MERLIN McCOLM

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff, v. ROBERT F. BURFORD, *et al.*, Defendants.	)	Civil Action No. 85-2238-JHP

DECLARATION OF STEPHEN BLOMEKE

Declarant, STEPHEN BLOMEKE, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF) and its affiliate the Colorado Wildlife Federation (CWF).

2. I reside at 1715 Ninth Avenue, Longmont, Colorado 80501.

3. I have lived in Colorado for eight years. During that time I have frequently used the federal lands which are administered by the Bureau of Land Management (Bureau) and the U.S. Department of the Interior (Department). I currently use these federal lands located throughout the state of Colorado and elsewhere, and I intend to continue such frequent and widespread use into the future.

4. I use these federal lands for recreational purposes and aesthetic enjoyment. My uses include hunting, fishing, camping and hiking. Among the game animals I hunt are grouse, deer, elk, antelope and ptarmigan. I fish primarily trout.

5. I often travel considerable distances across the state of Colorado to access areas containing prime habitat for these species. In so doing, I have used and continue to use the various campgrounds and recreation areas located on these federal lands.

6. Because of my extensive use of these federal lands, I have a personal interest in the management programs of the Bureau and the Department. My continued recreational and aesthetic enjoyment of these lands depends upon their being managed by the agencies in full compliance with the laws relating to preservation and protection of natural resources on the public lands they administer.

7. I am aware that the National Wildlife Federation has filed a lawsuit against the Bureau and the Department for unlawfully revoking protective land withdrawals and unlawfully terminating protective land classifications on the public lands pursuant to the Department's Land Withdrawal Review Program.

8. I am also aware that many Public Land orders and Secretary of the Interior orders have withdrawn specific areas of the federal lands which I use for recreational and aesthetic uses. These include: Public Land Order 2302 of March 14, 1961 (Indian Peaks Campground), Public Land Order 2553 of December 11, 1961 (Strawberry Campground), Public Land Order 2558 of December 11, 1961 (Gordon Gulch Campground, Ward Picnic Ground, Park

Creek Recreation Area and Sheep Creek Fish Habitat Study Area), and Public Land Order 2732 of July 19, 1962 (Buffalo Pass Campground).

9. Pursuant to the above stated Withdrawal Review Program, the Bureau and the Department unlawfully revoked all of the protective withdrawals which I use and which are mentioned in paragraph 8 above. *See* Public Land Order 6170, 47 Fed. Reg. 7414 *et. seq.* (Appendix I attached hereto).

10. As a result of these unlawful actions by the Bureau and the Department, these specific federal lands which I frequently use for the above stated recreational purposes and aesthetic enjoyment have been opened to the staking of mining claims and other forms of development. Such actions injure my enjoyment of these lands by threatening the aesthetic beauty and wildlife habitat potential of these lands.

11. My interest in recreational use and aesthetic enjoyment of the federal lands, and my interest in seeing that the laws pertaining to the preservation and protection of federal lands and their natural resources are complied with, have been adversely affected by these unlawful actions of the Bureau and the Department.

12. My interests are being fully and adequately represented by NWF in its lawsuit against the Bureau and the Department and my above stated injuries will be fairly redressed by a decision favorable to NWF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August ___, 1988.

/s/
STEPHEN BLOMEKE

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff, v. ROBERT F. BURFORD, *et al.*, Defendants.	)	Civil Action No. 85-2238-JHP

DECLARATION OF A. L. (WILL) OUELLETTE

Declarant, A.L. (WILL) OUELLETTE, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF) and its affiliate the New Mexico Wildlife Federation (NMWF).

2. I reside at Star Route, Box 12, Placitas, New Mexico 87043.

3. I have used the federal lands extensively for many years and I continue to use these lands almost on a daily basis. In particular, I use the federal lands which are administered by the Bureau of Land Management (Bureau) and the U.S. Department of the Interior (Department).

4. Areas of these federal lands which I have used and continue to use include the Lincoln, Pecos, Cibola, Gila and Carson National Forests, especially the wilderness areas associated with these forests, and adjacent lands

managed by the Bureau. I also use federal lands administered by the Bureau in the San Mateo Mountains, Mount Taylor, the Florida Mountains, and the White Oaks area.

5. I use these federal lands for recreational purposes and for aesthetic enjoyment. My uses include extended overnight camping, backpacking, and day hiking through the mountains, hunting, fishing, picnicing, horseback riding, packing with horses, and driving along scenic roads. The species I hunt include deer, barbary sheep, bear, coyote, elk, antelope, wild turkey and ibex.

6. Another specific area which I frequently visit is the Tent Rocks Picnic Area. My use there is mainly for aestheic enjoyment of that area's scenic rock formations and other vistas.

7. My recreational and aesthetic enjoyment of the above mentioned federal lands largely depends upon their being managed by the Bureau and the Department in full compliance with the laws pertaining to the preservation and protection of the federal lands they administer.

8. I am aware that the National Wildlife Federation has filed a lawsuit against the Bureau and the Department for unlawfully revoking protective land withdrawals and unlawfully terminating protective land classifications on the public lands pursuant to the Department's Land Withdrawal Review Program.

9. I am also aware that the specific federal lands which I use are among the federal lands which were protected by the withdrawals and classifications that were revoked and terminated under the above stated Withdrawal Review Program. These include, but are not limited to,

the Tent Rocks Recreation Area (protected by classification NM 9491 of September 17, 1970, 35 Fed. Reg. 14564, 14565, *unlawfully terminated* by Notice of June 9, 1981, 46 Fed. Reg. 31776, 31777) (*see* appendices I, II, and III attached hereto); areas of Lincoln National Forest (protected by Public Land Order No. 656 of August 15, 1950, *unlawfully revoked* by Public Land Order 5827 of February 20, 1981, 46 Fed. Reg. 7339, 7340); and areas of the Gila National Forest (protected by Secretarial Order of October 4, 1941, *unlawfully revoked* by Public Land Order 6314 of August 17, 1982, 47 Fed. Reg. 35768, 35769).

10. These unlawful actions by the Bureau and the Department have resulted in actual injury to my recreational use and aesthetic enjoyment of federal lands by opening specific areas which I use to the staking of mining claims, oil and gas leasing and development, disposal by exchange and other uses which adversely affect the aesthetic beauty and wildlife habitat potential of these lands.

11. My interest in recreational use and aesthetic enjoyment of the federal lands, and my interest in seeing that the laws pertaining to the preservation and protection of federal lands and their natural resources are complied with, have been adversely affected by the unlawful actions of the Bureau and the Department.

12. My above stated interests are being fully and adequately represented by NWF in its lawsuit against the Bureau and the Department and my above stated injuries will be fairly redressed by a decision favorable to NWF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 30 , 1988.

/s/ A.L. "Will" Ouellette
A L. (WILL) OUELLETTE

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WILDLIFE FEDERATION, Plaintiff, v. ROBERT F. BURFORD, *et al.*, Defendants.	)	Civil Action No. 85-2238-JHP

DECLARATION OF PEGGY KAY PETERSON

Declarant, PEGGY KAY PETERSON, being duly sworn and under penalty of perjury, based upon personal knowledge of the following facts as specifically appears herein, deposes and says:

1. I am a member of the National Wildlife Federation (NWF).

2. On April 7, 1986, I executed an affidavit which was filed in the instant civil action. I hereby incorporate that affidavit herein in its entirety.

3. I continue to reside at 3519 Partridge Lane, Casper Wyoming 82604.

4. I also continue to use the federal lands including those in the vicinity of the South Pass-Green Mountain area of Wyoming for recreational purposes and aesthetic enjoyment as stated in my April 7, 1986, affidavit. In particular, I use these federal lands for hiking, camping, hunting and fishing. I primarily hunt large game including deer and elk which are known to occupy these federal lands.

5. I specifically use the federal lands administered by the Bureau and the Department which were described in the order dated November 22, 1967, (32 Fed. Reg. 16057, 16058) classifying such lands for multiple-use management and segregating such lands from appropriation under the general mining laws.

6. I am aware that the above mentioned classification was unlawfully terminated by order dated April 30, 1984, with respect to these areas of the federal lands which I use. 49 Fed. Reg. 19904. This action by the Bureau and Department unlawfully removed the protection of natural resources afforded by the classification by opening such lands to location under the mining laws in violation of the laws pertaining to the preservation and protection of natural resources on the federal lands.

7. Further, I am aware that U.S. Energy Corporation has filed a mine permit application with the Bureau and Department, (U.S. Energy Application, TFN 2 4/86), which includes a proposal to mine a significant portion of the federal lands which I use for recreational purposes and aesthetic enjoyment.

8. A substantial portion of the lands which I use and which are included in the U.S. Energy permit application are identical to those lands described in the classification order mentioned in paragraph 5 above which was terminated by the order mentioned in paragraph 6 above.

9. My interest in recreational use and aesthetic enjoyment of these specific tracts of federal lands has been adversely affected by the Bureau's and Department's unlawful termination of a protective land classification. Such action, by authorizing the U.S. Energy mine permit

application causes substantial injury to my uses of these federal lands by threatening the aesthetic beauty and wildlife habitat potential of these lands.

10. My interests continue to be fully and adequately represented by NWF in its lawsuit against the Bureau and the Department and my interests will be fairly redressed by a decision favorable to NWF.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 28th, 1988.

/s/ Peggy Kay Peterson
PEGGY KAY PETERSON